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# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1933**

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## No. 94

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M. D. HICKLIN, INDIVIDUALLY, ETC., AND BLALOCK MOTOR EXPRESS, INC., APPELLANTS,

*vs.*

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, ET AL., ETC.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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## STATEMENT AS TO JURISDICTION OF COURT.

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These are cases (consolidated and heard together) in which the validity of two statutes of the State of South Carolina, to wit: Act No. 170 of 1925, XXXIV Statutes at Large, page 252, as amended by Act of 1928, XXXV Statutes at Large, page 1238, Acts of 1930, XXXVI Statutes at Large, pages 1068, 1100 and

1327, and Act of 1931, XXXVII Statutes at Large, page 145, now appearing, as so amended, as Chapter 162, Sections 8507 to 8524, both inclusive, of the Code of Laws of South Carolina, 1932, Vol. III, pages 954-962, and Section 66 of the general appropriation act of 1931, XXXVII Statutes at Large, page 453, are drawn in question, upon the grounds that said statutes are repugnant to Section 8 of Article I of the Constitution of the United States and to the Fifth and Fourteenth Amendments thereto. The final decision of the Supreme Court of South Carolina, the court of last resort in all causes in said State in which a decision could be had, is in favor of the validity of said statutes. Therefore, in accordance with the rules of the Supreme Court of the United States (Rule 46, Paragraph 2, immediately following 28 U. S. C. A., Sec. 354), the respondents herein respectfully show that these cases are ones in which under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54), was passed, to wit, under Sec. 237 (*a*) of the Judicial Code (28 U. S. C. A., Sec. 344) a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The opinion of the said Supreme Court of South Carolina, upholding the validity of the statutes in question, was filed on January 27, 1933, and has not yet been officially reported, but is unofficially reported in the Advance Sheets of the South Eastern Reporter, Vol. 167—No. 8, at page 674, as *State ex rel. Coney et al.* v. *Hicklin*, and *Ellerbe et al.* v. *Blalock Motor Express, Inc.*

The pertinent provisions of Chapter 162 of the Code of Laws of South Carolina, 1932 (being Act No. 170 of 1925, as amended, *supra*), are summarized as follows:

Section 8507 declares that the term "motor vehicle carrier", wherever used in Sections 8507 to 8524 means every corporation or person, their lessees, trustees, or receivers, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation over any improved public highway of the State; that the term "commission" means the South Carolina Railroad Commission; and defines other terms.

Section 8508 provides that

> "No corporation or person * * * shall operate any motor propelled vehicle * * * for transportation of persons or property for compensation on any improved public highways in this State except in accordance with the provisions of sections 8507 to 8524, and such operation shall be subject to control, supervision and regulation by the commission in the manner provided by sections 8507 to 8524: *Provided, however,* That nothing in sections 8507 to 8524 contained shall apply to motor vehicles while used exclusively for transporting persons to and from schools, Sunday schools, churches, or religious services of any kind, or to or from picnics or upon special prearranged excursions, or to United States mail carriers operating star routes, while engaged solely in carrying mail, or to farmers or dairymen, hauling

dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points."

Section 8509 provides that

"No motor vehicle carrier shall hereafter operate for the transportation of persons or property for compensation on any improved public highway in this State without first having obtained from the commission, under the provisions of sections 8507 to 8524, a certificate and paid the license fee herein required. The commission shall have the power to grant six classes of such certificates * * * respectively designated as A, B, C, D, E, and F."

Section 8510 defines the different classes of certificates, and prescribes the terms and conditions upon which the same shall be issued.

"* * * the commission may grant a certificate E for property-carrying vehicles which will not operate upon any particular route or schedule. * * * The commission shall have power to grant a certificate F to any person, firm, or corporation, proposing to engage in the business commonly known as contract hauling of freight or property, and when such applicant does not propose to operate upon a regular schedule or over a regular route, or to solicit or receive patronage along the route."

Section 8511 provides that

"The commission shall, in the granting of a certificate, require the applicant to procure and file with said commission liability and property

damage insurance, or surety bond with some casualty or surety company authorized to do business in this State, on such motor vehicle or vehicles to be used in the service aforesaid, in such amount as the commission may determine, insuring or indemnifying passengers or cargo and the public receiving personal injury by reason of any act of negligence, and for damage to property of any person other than the assured; such policy or bond to contain such conditions, provisions, and limitations as the commission may prescribe and the same shall be kept in full force and effect, and failure to do so shall be cause for the revocation of such certificate. * * *''

Section 8512 provides for the payment by such motor vehicle carriers of certain license fees annually, graduated, as to the first four classes, upon a mileage basis, but as to classes E and F, as follows:

''The holders of certificates E and F shall annually on or before January 1 of each year pay to the commission the following fees: For vehicles of carrying capacity of not over one and one-half tons, thirty ($30.00) dollars; for vehicles of carrying capacity of over one and one-half tons and not over two tons, sixty ($60.00) dollars; for vehicles of carrying capacity of over two tons and not over three tons, one hundred twenty ($120.00) dollars; for vehicles of carrying capacity of over three tons and not over four tons, two hundred ($200.00) dollars; for vehicles of carrying capacity of over four tons and not over five tons, four hundred ($400.00) dollars; for vehicles equipped fully with pneumatic

tires; for vehicles equipped fully or partially with solid tires these fees shall be doubled. The fees required of holders of certificates C, E and F shall be in addition to any license tax or license fee charged by any municipality. * * *"

Section 8516 provides that

"The commission is hereby vested with power and authority and it shall be their duty to supervise and regulate every motor carrier in this State; to fix or approve the rates, fares, charges, classification and rules and regulations pertaining thereto, of each such motor carrier. * * *"

Section 8518 provides for the revocation of certificates by the commission for the willful violation of the provisions of this Chapter, or of the rules and regulations of the commission.

Section 8520 provides for the punishment of any person wilfully violating any of the provisions of Sections 8507 to 8524, or any lawful order, decision, rule, regulation, direction, demand or requirement of the commission, by a fine of not less than twenty-five ($25.00) nor more than one hundred ($100.00) dollars, or by imprisonment for not less than ten days nor more than thirty days.

Section 66 of the general appropriation act of 1931 (XXXVII Statutes at Large, page 454, after making appropriation for the Railroad Commission, provides as follows:

"*Provided, further,* That the expense of the Motor Transport Division provided in Item 2

shall be paid by the Motor Transport Carriers for hire subject to regulation by the Railroad Commission, in such proportion as the gross revenue of each and every person, firm or corporation engaged in such motor transport service for hire shall bear to the whole of such expenses. For the purpose of ascertaining such revenue each and every person, firm or corporation engaged in the business of motor tranportation for hire shall file with the Railroad Commission on or before the fifteenth day of September, 1931, a return under oath, showing the gross revenue derived from the business of hauling freight and/or passengers for hire by means of Motor Vehicles during the first six months of the calendar year 1931. The said Railroad Commission shall within thirty days after the receipt of such returns file with the Comptroller General a statement of all such gross revenues, and the Comptroller General is hereby authorized, empowered and directed to levy against all persons, firms or corporations so engaged in such business an assessment prorated in accordance with the proportion above set forth. The Comptroller General shall immediately certify to the State Treasurer the amounts of such assessments, and on or before the fifteenth day of October, 1931, all persons, firms, or corporations against whom any such assessment may be made shall pay to the State Treasurer the amount of the assessment so levied. Any person, firm or corporation failing or refusing to make the return herein provided or to pay the assessment levied in accordance therewith shall be subject to the immediate revocation of his, her or its license by the Railroad Commission. The assessment

made in accordance with this provision shall be in addition to all other taxes or licenses which may by law be assessed against said motor transport carriers for hire and shall constitute a first lien against the property used in such transport service, enforceable as are liens for all other taxes."

The respondents respectfully submit that the exemptions under the proviso to Section 8508, excluding from the application to them of the provisions of Chapter 162 certain favored classes, namely, "farmers and dairymen hauling dairy or farm products" and "lumber haulers engaged in transporting lumber and logs from the forest to the shipping points", have no reasonable basis, but are entirely arbitrary and discriminatory and in conflict with the Constitution of the United States.

*Smith* v. *Cahoon*, 283 U. S. 553; 51 S. Ct. 582; 75 L. Ed. 1264.

*Nutt* v. *Ellerbe*, 56 F. (2d), 1058.

*Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, 85; 45 S. Ct. 12, 15; 69 L. Ed. 169.

*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563, 564; 22 S. Ct. 431; 46 L. E.. 679.

Respondents further contend that Chapter 162 of Code of Laws of S. C., 1932, is unconstitutional in that although it does not in express terms demand that a private carrier shall constitute itself a common carrier, it purports to subject all the carriers which are within the terms of its definition to the same obliga-

tions. Such a scheme of regulation of the business of a private carrier, such as the respondents, is manifestly beyond the power of the State.

*Smith* v. *Cahoon, supra.*

*Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570; 45 S. Ct. 191; 69 L. Ed. 455; 36 A. L. R. 1105.

*Frost & Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583, 592; 46 S. Ct. 605; 70 L. Ed. 1101; 47 A. L. R. 457.

The license fees required of contract carriers under Sections 8512 are based wholly on the "carrying capacity" of the vehicle, and, certainly as to those contract carriers engaged in interstate commerce, this tax is void, for the reason that it is not compensatory. The compensation which a State may exact of motor vehicles using its highways in interstate commerce must be based strictly upon the amount and extent of the used of the highways or it will be held to be an undue burden on interstate commerce; a flat charge based upon the capacity or weight of the vehicle alone is improper. Under the statutes of South Carolina, this license tax must be paid by an interstate carrier for a single trip into that State.

*Interstate Transit, Inc.,* v. *Lindsey,* 283 U. S. 183; 51 S. Ct. 380; 75 L. Ed. 953.

*Clark* v. *Poor,* 274 U. S. 554; 47 S Ct. 702; 71 L. Ed. 1199.

If the provisions of Chapter 162, *supra,* be held to be unconstitutional for the reasons above set forth,

then the tax imposed upon contract carriers by Sec. 66 of the Act of 1931, *supra*, must likewise be held to be void as to them, inasmuch as such tax is imposed only upon those carriers subject to regulation by the commission, and for the further reasons (*a*) that said tax is imposed upon the entire gross receipts of such motor carriers, regardless of whether such receipts are derived from interstate or intrastate operations, and (*b*) is not in lieu of all other taxes.

*Nutt* v. *Ellerbe, supra.*

*New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338.

*Sprout* v. *South Bend,* 277 U. S. 163, 170, 171.

*Alpha Cement Co.* v. *Mass.,* 268 U. S. 203, 218, 219.

*Pullman Co.* v. *Richardson,* 261 U. S. 330, 338.

*Mayor* v. *Wells,* 223 U. S. 298; 32 S. Ct. 218; 56 L. Ed. 445.

*Fargo* v. *Stevens,* 121 U. S. 230; 7 S. Ct. 857; 30 L. Ed. 888.

The decision of the Supreme Court of South Carolina, from which this appeal is prayed, was entered on January 27, 1933. This application for appeal is presented to the Chief Justice of the Supreme Court of South Carolina on the 24th day of April, 1933.

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Columbia, S. C., April 24, 1933.

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